OCT 25 1950

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 118

CHARLES RALPH JOHNSTON,
Petitioner,

vs.

DAVID McINTEE, etc., et al.,
Respondents.

PETITION FOR REHEARING.

CHARLES RALPH JOHNSTON,
and HECTOR A. BROUILLET,
Attorneys for Petitioner.

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MAY IT PLEASE THE COURT:

Petitioner, by his attorneys, presents herewith his Petition for a rehearing of his Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit, and says:

I.

The Court of Appeals ruling deprives Petitioner of his day in Court solely by reason of its error in interpreting Rule 25(c) of the Federal Rules.

The sole issue on this appeal is whether petitioner is entitled to his day in court. The Court of Appeals ruling denies petitioner that right. Such denial is based entirely upon a misinterpretation of Rule 25(c) of the Federal Rules of Civil Procedure. This Court repeatedly has granted certiorari when an important denial of justice has occurred in the Courts of Appeal where the sole issue involved is an interpretation of the Federal Rules of Civil Procedure. The denial of petitioner's day in court is an important denial of justice, since it affects other future litigants also.

The Circuit Court's misinterpretation of Rule 25(c) is based primarily upon an improper application of this Court's decision in *Anderson* v. *Yungkau,* 329 U.S. 482, which interprets Rule 25(a) exclusively, *and has no applicability whatever to Rule* 25(c). In construing Rule 25(c), the Circuit Court also by judicial fiat, has injected a condition into Rule 25(c) which is not contained in that Rule by any language whatever; and which will result in a substantial denial of justice to petitioner and to other future litigants, by depriving them of their day in court, if certiorari should not be granted by this Court.

The condition so injected into Rule 25(c) requires an intervenor, in an action in the District Court involving a *res,* to claim ownership of or a lien upon the entire *res;* and deprives the intervenor of the right to intervene whenever, as in the instant case, he claims ownership of or a lien upon only a part of the *res.* The Circuit Court er-

roneously has deprived petitioner of his day in court upon the sole ground that he does not claim ownership of or a lien upon the entire *res,* thereby injecting into Rule 25(c) a condition which is neither directly or indirectly contained in said Rule 25(c).

Respondents' Answer (p. 4, 6) concedes that petitioner was deprived of his day in court solely under Rule 25(a), as interpreted by this Court in the *Anderson* v. *Yungkau* case. It is respondents' argument that "since this case had to be and was dismissed *pursuant to Rule* 25(a)(1)" in relation to another litigant, whether petitioner was entitled to his day in court under Rule 25(c) is irrelevant.

The complete answer to this position is that it makes no difference whether the case, as to a litigant other than petitioner, was dismissible under Rule 25(a)(1), since petitioner's right to his day in court under Rule 25(c) persisted and still persists.

The Court of Appeals' denial of petitioner's right to his day in court under Rule 25(c) cannot be justified upon the theory that the case was dismissible as to *an entirely different litigant* under Rule 25(a)(1). Such dismissibility was based upon the death of the other litigant, and the failure (for which petitioner was not responsible) of the legal successors in interest to said deceased litigant to appear in the case within the two-year period prescribed in Rule 25(a) cannot concern petitioner's separate right to his day in court under Rule 25(c).

The case was still pending when petitioner sought his day in court under Rule 25(c); and no valid ground for denying petitioner his day in court under Rule 25(c) appears in the Circuit Court's opinion, except upon the untenable theory that he claimed to be an owner or a lienor of less than the total *res* involved in the litigation.

This Court should not permit the Federal Rules of Civil Procedure to be so far misinterpreted and distorted as to deprive petitioner of his day in court (1) by a misapplication of this Court's opinion in the *Anderson* v. *Yungkau* case construing *only* Rule 25(a), and having *no applicability* to Rule 25(c); and (2) by the improper injection into Rule 25(c) of a requirement that petitioner must claim to be the owner or lienor of the entire *res* involved in the litigation, which condition does not appear in Rule 25(c) either in terms or by implication.

II.

The Court of Appeals ruling is in conflict with other opinions of the Circuit Courts of Appeal.

Petitioner contends that his right to one-third of the *res* sued for in this case was assigned to him *pendente lite* on September 5, 1942 (Tr. 23), which date was *ten months after the suit was filed* on November 29, 1941 (Tr. 2).

Respondents' argument under Point I of their Answer admits that if petitioner was a transferee *pendente lite*, then the rule in *Dryden* v. *Land Investment Co., Inc.*, 127 F. (2d) 586, would apply, holding that a transferee *pendente lite* may have his day in court under Rule 25(c). *Hazeltine Corp.* v. *Kirkpatrick*, 165 F. 2d 683, *Roberts Mining & Milling Co.* v. *Schrader*, 95 F. 2d 522, and *Sanders* v. *Hall*, 75 F. 2d 399, are to the same effect. In the latter case, the transferee became the sole party plaintiff.

Petitioner construed the *Dryden* case to hold that a transferee before suit may have his day in court under Rule 25(c); but if respondents are correct and the *Dryden* case involved a transferee *pendente lite*, then that case would support petitioner's right to his day in court in the instant case, because he did not become transferee until ten months after the suit was filed.

It follows that respondents' denial that there is any conflict between the *Dryden* case as they construe it and the instant case is without merit, since in this case petitioner is a transferee *pendente lite,* and should be granted his day in court under that decision, which conflicts directly with the Circuit Court's decision in the instant case.

Respondents also argued that the case of *Hood* v. *Bell,* 84 F. 2d 136, is not in conflict with the Court of Appeals' decision in the instant case because the *Hood* case was decided before the Federal Rules were adopted and did not involve a deceased party. We have already seen that Rule 25(c) does not involve a deceased party, that being a matter of significance only under Rule 25(a). The date of the adoption of the Federal Rules has nothing to do with the holding in the *Hood* case. The whole point of the *Hood* case was that a transferee *who makes his motion for substitution prior to the time an order of dismissal is entered in the case* is entitled to his day in court therein, *even though the case was subject to a possible order of dismissal at the time the intervenor sought to intervene.* It thus follows that respondents' attempt to distinguish the *Hood* case on irrelevant matters cannot meet petitioner's correct contention that the deprivation of his right to his day in court in the instant case is directly contradictory to the rule in the *Hood* case, *in which the transferee was granted his day in court under circumstances identical to the instant case.*

Petitioner concludes that the square conflict between the unanimous opinion of the Fourth Circuit Court by Judge Parker in the *Hood* case and the opinion of the Seventh Circuit Court in the instant case, upon the very same issue as to whether an intervenor shall be deprived of his day in court if, while the case is still pending, and although subject to possible dismissal, the intervenor's application

actually is made before any order of dismissal is entered, is a conflict which justifies the granting of certiorari under both the meaning and spirit of Rule 38(5)(b) of this Court.

CONCLUSION.

There is no more important right to be protected by the Supreme Court than the right of every litigant, present and prospective, to have his day in court.

Wherefore, petitioner prays that this Court may grant a rehearing and reconsider its order denying certiorari herein.

Respectfully submitted,

CHARLES RALPH JOHNSTON
and HECTOR A. BROUILLET
Attorneys for Petitioner.

Certificate.

I hereby certify that I am one of the attorneys for the petitioner in the above entitled cause; and that I am a member of the bar of this Court. I hereby further certify that the foregoing Petition for Rehearing is made in good faith; and in my opinion is well founded in point of law; and is not filed herein for purposes of delay.

HECTOR A. BROUILLET

IN THE

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Respondents.

PETITIONER'S BRIEF SUPPORTING PETITION FOR REHEARING.

I.

Respondents' brief states (p. 1-2) that "Reka Goldberg Hofheimer (hereinafter called "plaintiff") filed her complaint November 29, 1941 (Tr. 2)," and that the assignment of the 500 shares of preferred stock and 1500 shares of common stock to petitioner was made on September 25, 1942, and was therefore made *pendente lite.*

Respondents' argument under Point I is that both *Dryden* v. *Land Investment Co., Inc.,* 127 F. (2d) 586, and "the *opinion* of the Court in this case" (p. 5) hold that a transfer *pendente lite* is "a transfer within the meaning of Rule

25(c)." Petitioner thoroughly agrees that a transfer *pendente lite* requires a substitution under Rule 25(c). See *Hazeltine Corp.* v. *Kirkpatrick,* 165 F. 2d 683; *Roberts Mining & Milling Co.,* v. *Schrader,* 95 F. 2d 522, and *Sanders* v. *Hall,* 75 F. 2d 399, where the transferee became sole party plaintiff.

The *decision,* as distinguished from the *opinion,* of the United States Court of Appeals in the case at bar is therefore in direct conflict with *both* the *Dryden* case and the *opinion* itself, for the reason that, as shown by respondents' opposing brief (p. 1-2), the assignment to petitioner was made on September 25, 1942 (Tr. 23), which was *ten months after the suit was filed* on November 29, 1941 (Tr. 2) and was therefore an assignment *pendente lite* insofar as petitioner's rights are concerned.

Thus it makes no difference if the *Dryden* case involved a transferee *pendente lite* rather than a transferee before suit. The truth is that Rule 25(c) contains *no condition* requiring the party seeking to be substituted to be a transferee before suit or a transferee *pendente lite;* and as we read the *Dryden* case, the Court there so held. That holding is clearly in direct conflict with the *decision* (as distinguished from the *opinion*) of the United States Court of Appeals in the instant case.

II.

Respondents argue (p. 5) under Point II that the case of *Hood* v. *Bell,* 84 F. 2d 136, is not in conflict with the Court of Appeals' opinion in the case at bar, because: "The *Hood* case was decided before the adoption of the Federal Rules of Civil Procedure and did not involve a deceased party." These matters, however, do not go to the issue on which petitioner cited the *Hood* case in his petition.

The whole point of the *Hood* case is that Judge Parker, speaking for a unanimous court, squarely held that it was reversible error for the District Court to enter an order dismissing the case, even though such order of dismissal as to the prior plaintiff was proper, *where the transferee had made his motion for substitution prior to the time the order of dismissal was entered. This was precisely the situation in the case at bar.*

Respondents, in an effort to distinguish the *Hood* case, argue (p. 6) that "Rule 25(c) contemplates that the original party be living."

But there is *no such condition* in Rule 25(c).

Nor is there any provision in Rule 25(c) which incorporates Rule 25(a) into Rule 25(c). The two Rules are completely separate, as respondents correctly say (p. 6).

Rule 25 is divided into four sections headed as follows: (a) "Death"; (b) "Incompetency"; (c) "Transfer of Interest"; and (d) "Public Officers; Death or Separation from Office."

An examination of Rule 25(a) (death provision) shows that the word "substitution" is there used as meaning the substitution of a deceased party by his "successors or [legal] representatives;" and the penalty clause provides that if such "substitution" is not made "by the successors or representatives of the deceased party," then "the action shall be dismissed AS TO THE DECEASED PARTY." (Emphasis added.) Had the Advisory Committee drafting this Rule intended that Rule 25(c) (transfer of interest provision) should include and apply to transferees in interest of a dead party, they surely would have said so, in clear and specific language.

In other words, it is plainly contemplated by Rule 25(a) (death provision) that the "substitution" there referred to

is a substitution in which the duly appointed legal representatives of the deceased party, or his successors in interest resulting from his death, shall have the right, within two years of such party's death, to come in and prosecute or defend the action for the benefit of the estate or the heirs of the deceased party. The only penalty provided in Rule 25(a) (death provision) is that, if this is not done within two years, "the action shall be dismissed AS TO THE DECEASED PARTY." (Emphasis added.)

It will be particularly noticed that there is in Rule 25(a) (death provision), which says that under such circumstances, that is, the death of a party and failure to substitute his legal representatives or heirs within two years, "the action shall be dismissed", no penalty *as to any party other than the deceased party.*

Petitioner's motion for substitution, on the other hand, was made under Rule 25(c) (transfer of interest provision), which expressly provides that "the action may be continued by or against the original party" in the event that there shall be *any* voluntary "transfer of interest," (as distinguished from an involuntary transfer resulting from death of a party); and that in that event the transferee may be "*substituted* in the action or *joined with the original party.*" (Emphasis added.)

Thus the word "substitution" has an entirely different meaning in Rule 25(c) (transfer of interest provision), which has no relation whatever to the death of a party, but relates exclusively to a *voluntary* transfer *inter vivos;* and is not the type of "substitution" which is contemplated under Rule 25(a) (death provision), which relates exclusively to the *involuntary* transfer resulting from the death of a party. The "substitution" contemplated in Rule 25(c) (transfer of interest provision) assumes that the transfer shall be by some *voluntary* means, in contrast to the *in-*

voluntary legal transfer to a decedent's representatives or heirs-at-law referred to in Rule 25(a) (death provision); for in Rule 25(c) it is made plain that if *all* of the transferor's interest has *not* been voluntarily transferred to the transferee, then the transferee shall not be "substituted" for but shall be "*joined with* the original party."

The case of *Individual Drinking Cup Co.* v. *Lily-Tulip Cup Corp.*, 15 F. Supp. 393, clearly supports the foregoing statements. In that case, the plaintiff corporation transferred *pendente lite* its interest to its transferee and then was dissolved; such dissolution being the equivalent of the death of an individual party litigant. It was nevertheless held that the voluntary *transferee pendente* lite was entitled to be substituted for the plaintiff and to continue the litigation. See also *Irving Airchute Co.* v. *Switlik*, 26 F. Supp. 329, *Myers* v. *Canton National Bank*, 109 F. 2d 31, allowing a substitution by a transferee *pendente lite* on appeal to the Circuit Court of Appeals. The *Drinking Cup Co.* case cites and relies upon *Ross* v. *City of Ft. Wayne*, 63 F. 466, which summarizes many earlier cases to the same effect. *George W. Jackson, Inc.* v. *Friedstedt, etc., Co.*, 159 F. 496.

The case of *Anderson* v. *Yungkau*, 329 U. S. 482, *deals exclusively* with Rule 25(a) (death provision); and *has nothing whatsoever to do* with Rule 25(c) (transfer of interest provision). It cannot effectively be argued, therefore, that this Court held in the *Anderson* case that Rule 25(c) (transfer of interest provision) should have incorporated in it by judicial fiat (for the rule actually contemplates no such limitation) a condition to the effect that a transferee in interest cannot be "substituted" or "joined," *unless the transferor is still alive (or, if a corporation, is still undissolved) at the time when the transferee's motion is made, or unless the motion is made within the two-year limitation appearing only in Rule* 25(a) *(death provision).*

Respondent's brief concedes (p. 6) that Rule 25(c) contains no reference whatsoever to the death of a party. It correctly says:

> "The term 'deceased party' nowhere appears in Rule 25(c)."

By this concession it must also be conceded that the *Anderson* case has no applicability to the issue on this appeal.

III.

The whole basis of respondents' argument under Point III (p. 6-7) is that: "The petitioner sought to adopt Hofheimer's complaint *in its entirety* to recover *the entire res*, whereas petitioner himself claims no more than one-third thereof." Respondents then argue (p. 7) that petitioner's cases do not hold "that an assignee of *part* of a *res* may sue to recover *the entire res.*"

These statements are without the slightest foundation in fact. Both "Plaintiff's Amended and Supplemented Complaint, as Further Amended and Supplemented" (Tr. 24-5) and plaintiff's affidavit in support of his motion to be substituted (Tr. 17-24) state flatly that plaintiff is suing only for *his one-third of the stock* originally claimed by Reka Goldberg Hofheimer, the original plaintiff herein. Respondent's amendment to the complaint alleges:

> "This plaintiff [petitioner] is the assignee and owner of an UNDIVIDED ONE-THIRD (1/3) of fifty (50) shares of common, and twenty (20) shares of preferred, stock of, and other interests in, the Hump Hair Pin Manufacturing Company, a West Virginia corporation, and Chain Store Products Corporation, a Delaware corporation, and their respective subsidiaries and affiliates, and certain claims against them, their officers, agents, and others, all of which heretofore were owned by Reka Goldberg Hofheimer, the original Plaintiff herein" (Tr. 24). (Emphasis added.)

Petitioner's affidavit states that petitioner

> "is the sole and absolute legal and equitable owner of an UNDIVIDED ONE-THIRD (1/3) of all the aforesaid common and preferred stock, together with a like proportion of the additional stock claimed by Plaintiff (Reka Goldberg Hofheimer) and of all other of Plaintiff's claims, as set forth in said Amended Complaint" (Tr. 18-19). (Emphasis added.)

The statement in respondents' brief (p. 6-7), that petitioner cannot be substituted *because he claims the whole of the stock* claimed by the original plaintiff, Reka Goldberg Hofheimer, is completely untrue.

All that petitioner claims is *his one-third* of the preferred and common stock assigned to him as transferee *pendente lite,* as the foregoing quotations from petitioner's pleadings incontestably show. Many cases support petitioner's right to become a party and carry on the litigation under such circumstances. *Friedman* v. *Harris,* 158 F. 2d 187; *Kellogg* v. *Winchell,* 273 F. 745; *Woodbury* v. *Andrew Jergens Co.,* 69 F. 2d 49; *Patrick* v. *Leach,* 17 F. 476; *Universal Oil Products Co.* v. *Standard Oil Co. of Ind.,* 1 F. Supp. 612; *Walker* v. *Hartford Realization Co.,* 74 F. 2d 56; *Byram* v. *Miner,* 47 F. 2d 112.

It will be noticed that none of the decisions of this Court and the Circuit Courts of Appeal cited in petitioner's Petition for Certiorari (p. 7-8) are contested by respondents. These cases show that the statements in the opinion of the Court of Appeals in the case at bar, to the effect that petitioner could not be substituted as sole plaintiff because "he is not the owner of *the entire res* involved (Tr. 50)" and because "he was not an assignee of *the whole res* (Tr. 50)", are without the slightest merit, and are in direct conflict with all of the cases cited on pages 7 and 8 of petitioner's Petition for Certiorari.

CONCLUSION.

Respondents do not deny that this Court will grant *certiorari* in cases involving the true and proper construction of the Federal Rules of Civil Procedure, including Rule 25(c), which is the question here involved. Especially will this Court grant *certiorari* where a litigant has been deprived of his day in court upon jurisdictional matters which do not appear in the Federal Rules.

Respondents' brief is soley directed to an effort to show that there is no conflict between the "*opinion*" (as distinguished from the "*decision*") in the case at bar, on the one hand, and the *Dryden* and *Hood* cases, on the other hand. But it is not necessary for petitioner to show any such conflict, although it clearly appears, for the reasons above stated, that such a conflict does exist.

This Court has made it plain that it will grant *certiorari* whenever a proper construction of the Federal Rules of Civil Procedure in general, and particularly Rule 25, as in the *Anderson* case, is involved. Not only is it of utmost importance that there may be uniformity in the holdings of the Federal Courts as to jurisdiction; but this Court's interpretation of the Federal Rules of Civil Procedure in and of itself is sufficiently important to the effective operation of the Federal Rules throughout all the District Courts of the United States to warrant granting *certiorari* in this case.

Wherefore, petitioner respectfully submits that this Court should grant a rehearing and reconsider its order denying *certiorari* herein.

Respectfully submitted,

CHARLES RALPH JOHNSTON
and HECTOR A. BROUILLET,
Attorneys for Petitioner.

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RESPONSE TO PETITION FOR REHEARING.

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THE GUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

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The petition for rehearing fails to "state grounds which are confined to intervening circumstances of substantial or controlling effect or to other substantial grounds available to petitioner although not previously presented" as required by Rule 33 of this Court. Further, the certificate of counsel supporting the petition for rehearing fails to certify that the petition is restricted to the grounds above specified, as required by Rule 33.

The points set forth in the petition for rehearing and also in the petitioner's supporting brief were made in the petition for certiorari and in the brief supporting that petition, and were answered by respondents in their opposing brief.

For this reason the petition for rehearing should be denied.

Respectfully submitted,

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